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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/608,743	06/30/2000	Jerrell P. Hein	75622.P0018	1566
22503 7590 03/10/2010				
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EXAMINER				
BRINEY III, WALTER F				
ART UNIT		PAPER NUMBER		
2614				
MAIL DATE		DELIVERY MODE		
03/10/2010		PAPER		

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JERRELL P. HEIN and
MARIUS GOLDENBERG

Appeal 2009-001026
Application 09/608,743
Technology Center 2600

Decided: March 10, 2010

Before JOSEPH F. RUGGIERO, ROBERT E. NAPPI, and
KARL D. EASTHOM, *Administrative Patent Judges*.

NAPPI, *Administrative Patent Judge*.

DECISION ON REHEARING

Appellants have filed a paper under 37 C.F.R. § 41.52 requesting that we reconsider our decision of August 28, 2009, wherein, we affirmed the rejection of claims 1, 3, 5-7, 9, 10, 12, 15, 16, and 18 under 35 U.S.C. § 103(a).

Appellants contend that:

- i) The Board's decision erred by excluding/ignoring evidence and arguments thereby holding Appellants to an improper evidentiary standard. Request for Rehearing 3, 4, and 5.
- ii) The Board's decision erred by ignoring admissions by the Examiner that supported Appellants' contentions. Request for Rehearing 3 and 5-10.
- iii) The Board's decision erred in failing to properly consider that the references *taught away* from the combination. Request for Rehearing 3-4.

We address the Appellants' contentions sequentially.

Appellants' contention i):

Appellants have not persuaded us that we excluded/ignored evidence and arguments thereby holding Appellants to an improper evidentiary standard. Appellants argue that the Board is holding Appellants to an improper evidentiary standard because it is fundamental to transistor amplifier design that common base transistor amplifier stages provide less than unity gain. Request for Rehearing 4. In addition, Appellants argue that this issue was not originally debated. Request for Rehearing 4. We disagree.

In their Appeal Brief, Appellants stated that common base transistor amplifier stages provide less than unity gain. App. Br. 7. The Examiner responded stating that Appellants' assumption that all amplifiers with common base stages produce less than unity gain is unsupported by evidence and contradicted by the Robe reference. Ans. 18. Appellants did not rebut this finding by the Examiner in a Reply Brief. Subsequently, we also noted in our Decision that Appellants have not cited to evidence that supports their statement that common base transistor amplifier stages provide less than unity gain. Decision 9. Now, on the Request for Rehearing, Appellants are providing new arguments to address this issue. Request for Rehearing 4-5. Under 37 C.F.R. § 41.52, "[a]rguments not raised in the briefs before the Board and evidence not previously relied upon in the brief and any reply brief(s) are not permitted in the request for rehearing except as permitted by paragraphs (a)(2) and (a)(3) of this section." Since Appellants have not pointed out why the new arguments fall into the exceptions in 37 C.F.R. § 41.52(a)(2) or (a)(3), these arguments are waived as Appellants did not raise them in the Briefs.

For the aforementioned reasons Appellants' first contention that the Board excluded/ignored evidence and arguments thereby holding Appellants to an improper evidentiary standard has not convinced us to change our decision of August 28, 2009.

Appellants' contention ii)

Appellants have not persuaded us that we erred by ignoring admissions by the Examiner that supported Appellants' contentions. Appellants argue that the Board erred in finding that there is no indication

that Rosch teaches that amplifiers 132 and 134 provide greater than unity gain. Request for Rehearing 6. Appellants argue that the Board was in error for the following reasons: “1) the fact that a common base transistor amplifier stage has a less than unity current gain is well known in the art; 2) this fact was not an issue disputed by the Examiner; 3) support for this proposition is found in the Specification at page 14 (referring to transistor alpha values); 4) the Examiner cited references (e.g., Millman, Table 8-5, pg. 254) confirming a current gain of less than unity for a common base transistor amplifier stage.” Request for Rehearing 7.

First, as noted above in response to Appellants’ contention i, the Examiner found and we agreed that Appellants did not provide sufficient evidence to support Appellants’ argument that common base transistor amplifier stages must have less than unity gain. Second, Appellants’ argument that less than unity current gain is well known in the art was disputed by the Examiner on page 18 of the Examiner’s Answer; Appellants did not dispute these findings in a Reply Brief; and we agreed with the Examiner in our Decision on page 9 that Appellants have not provided sufficient evidence to support this argument. Third and fourth, Appellants’ arguments relying upon Appellants’ Specification and the Examiner cited references both are arguments that are waived as they were not present in the Briefs. Thus, we decline to consider these new arguments.

Additionally, Appellants argue that the Board ignored the “limitation that required the linefeed driver control signals to be carried as currents on the same line.” Request for Rehearing 9. “The request for rehearing must state with particularity the points believed to have been misapprehended or overlooked by the Board.” 37 C.F.R. § 41.52(a)(1). The Examiner found,

on page 4 of the Answer, that Rosch teaches this limitation. Appellants stated on page 8 of the Appeal Brief that none of the references teach this limitation. We considered Appellants' statements to be conclusory since Appellants did not provide further explanation nor did Appellants cite further evidence to rebut the findings by the Examiner. Decision 9. No other argument, explanation, or evidence was presented in either the Appeal Brief or in a Reply Brief. As a result, we decline to consider Appellants' new arguments.

For the aforementioned reasons Appellants' second contention that the Board's decision erred by ignoring admissions by the Examiner that supported Appellant's contentions has not convinced us to change our decision of August 28, 2009.

Appellants' contention iii)

Appellants have not persuaded us that the Board's decision erred in failing to properly consider that the references *taught away* from the combination. Appellants argue that the Examiner's proposed combinations of Rosch with Robe or Pryor were properly rebutted by arguing that the references taught away from the combination. Request for Rehearing 3. Appellants additionally argue that the Board did not consider the "teaching away" arguments. Request for Rehearing 3-4. We disagree.

While the Decision did not specifically state "teaching away" in its discussion, Appellants' arguments associated with "teaching away" were discussed. Appellants' arguments related to "teaching away" dealt with Rosch not suggesting common base transistor stages since Rosch discloses unity gain or greater for its amplifier stages. App. Br. 9. As noted above,

the Examiner addressed this issue by finding that Appellants' assumption that all common base amplifier stages produce less than unity gain is unsupported by evidence. Ans. 18. As discussed *supra*, Appellants did not rebut this finding by the Examiner.¹ As such, we agreed with the Examiner that Appellants had not cited sufficient evidence to support this assertion. Decision 9. Therefore, the Board did properly address Appellants' argument that the references "taught away" from the combination.

For the aforementioned reasons, Appellants' third contention, that the Board's decision erred in determining that it was obvious to combine Rosch with Robe and Rosch with Pryor, has not convinced us to change our decision of August 28, 2009.

CONCLUSION

Appellants' request for rehearing is granted to the extent that we have reconsidered our prior decision in light of Appellants' arguments. We are not persuaded of any errors in our prior decision and maintain the rejection of claims 1, 3, 5-7, 9, 10, 12, 15, 16, and 18. Thus, the request for rehearing is DENIED.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

¹ The Examiner also found in the alternative that Robe's amplifier does not teach away because while it includes common base transistors stages, the whole amplifier has more than unity gain. (*See* Ans. 18.) Appellants did not address, much less rebut, this alternative finding.

Appeal 2009-001,026
Application 09/608,743

REHEARING DENIED

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